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IN THE

Supreme Court of the United States

OCTOBER TERM — 1955

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

vs.

WILLIAM E. HALLADA, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petitioner, Great Northern Railway Company, respectfully prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of the State of Minnesota, dated June 21, 1955, entered in the above entitled cause pursuant to its opinion dated June 10, 1955.

Citations to Opinions Below

The June 10, 1955 opinion of the Minnesota Supreme Court (R. 881) is not yet reported in the official or unofficial reports, but the earlier opinions dated February 25, 1955, and April 1, 1955, are reported at 69 N. W. 2d 673. (See Appendix pages 3A–27A.) The memorandum of the trial judge filed with his order denying petitioner's Alternative Motion for Judgment Notwithstanding the Verdict or for a New Trial appears at page 645 of the Record.

Jurisdiction

The final judgment of the Minnesota Supreme Court was entered on June 21, 1955 (Appendix p. 28A), pursuant to its decision of June 10, 1955 and its earlier opinions of February 25 and April 1, 1955, the latter being rendered on petitioner's appeal from an intermediate order. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3), since the decision of the Minnesota Supreme Court decided questions of importance to the construction and application of the Federal Employers' Liability Act and the coupler provisions of the Safety Appliance Act in a way not in accord with the decisions of this Court in *O'Donnell v. Elgin J. & E. R. Co.*, 338 U. S. 384, *Affolder v. New York C. & St. L.*, 339 U. S. 96, and *Mpls. St. P. & S. S. M. Ry. Co. v. Moquin*, 283 U. S. 520.

Questions Presented for Review

This case involves the amputation of the right arm of a brakeman 30 years of age as a result of being knocked off a railroad car during an attempt to effect a coupling of two cars on a curved track during a switching movement. The action was brought under the Federal Employers' Liability Act. Violation of the Safety Appliance Act and general negligence were alleged in a single complaint. There was no evidence of a specific defect in the couplers, respondent merely showing that the cars failed to couple on a curved track and that the coupling was attempted at a speed higher than usual. There was evidence that the two cars had coupled on impact on a straight track just before the accident, that the drawbars on the couplers of cars to be coupled on a curved track have to be in proper alignment in order to couple on impact, and that when this coupling was attempted on the curve the drawbars were not in proper alignment.

The jury brought in a verdict of $170,154.81. The Supreme Court of the State of Minnesota reduced the verdict to $105,000. On this record, the following questions are presented:

(1) Where the evidence showed that there were no mechanical defects in the couplers, that the coupling was attempted on a curved track and that the drawbars had not been properly set and aligned to compensate for the curvature, does not the petitioner have a complete defense to respondent's cause of action under the Safety Appliance Act, respondent's only evidence being that the cars failed to couple on impact?

(2) Whether the failure of the trial court to separate and distinguish between the possible liability of the petitioner

under the Safety Appliance Act because of failure to couple on impact and the possible liability under allegations of general negligence, in view of the availability of contributory negligence to reduce the damages in the one instance and not in the other, required a granting of petitioner's motion for a new trial?

(3) Whether in a F.E.L.A. case in which the record of the trial discloses manifest sources of passion and prejudice, one of which was termed an "objectionable maneuver" by the trial judge, and the Supreme Court of the State reduced the verdict on account of unreasonableness and excessiveness, the entire verdict, rather than only a part of it, is not vitiated by the passion and prejudice, so that a new trial should be ordered?

Statutes Involved

The statutory provisions involved are (1) the coupler provision of the Safety Appliance Act, 45 U.S.C. Section 2, and (2) the Federal Employers' Liability Act, 45 U.S.C. Sections 51 and 53, both of which are set forth at pages 1A and 2A of the Appendix hereto.

STATEMENT OF THE CASE

Respondent (plaintiff below) brought this action against the petitioner (defendant below) under the Federal Employers' Liability Act to recover damages for personal injuries. Because the complaint (R. 1) alleged that defendant was guilty of both negligence and a violation of the Safety Appliance Act, this statement will be subdivided into appropriate parts.

General Narrative of Accident

On the morning of October 16, 1952, the crew of an eastbound local way freight had some switching to perform at Lakota, North Dakota. Respondent was a brakeman on the crew under control of Brakeman Hiney. The yard consisted of 6 parallel tracks running east and west. The most southerly track was a so-called elevator track which connected by means of a switch to the No. 1 track immediately to the north. (See Defendant's Exhibit B.) An empty tank car at the west end of the elevator track had to be picked up. East of the tank car was a flat car of rails which was to remain spotted near a stock pile of railroad materials. Brakeman Offerdahl herded the engine with two box cars coupled at its west end from the main line to the east switch to the elevator track on the No. 1 track. During this movement, Hiney told respondent what switching movements were to be made. (R. 137, f. 1) Then the westerly box car was coupled to the east end of the flat car and the coupling was made on impact. (R. 382, f. 2) (It is a subsequent failure of these two cars to couple on impact, on a curved track, which is claimed to have violated the Safety Appliance Act.) The movement proceeded westerly and coupled to the empty tank car. Then the engine and four cars moved east onto the No. 1 track to a point east of the switch to the elevator track.

Then began the series of movements out of which the accident arose. The empty tank car was kicked westerly down the No. 1 track to a point west of the switch to the elevator track. The switch was lined over and the flat car was kicked westerly on the elevator track, and, as the flat car was moving, respondent boarded the car to ride it to the stock pile

area. However, the flat car stopped on the elevator track before it was clear of the No. 1 track, and the east end of the flat car was stopped at the frog of the switch about a car length west of the switch proper. (R. 46, 284)

Respondent got off the flat car and had a conversation with Hiney which may be summarized as follows: (R. 110-112, 412)

> Hiney: "Is there a brake on that car?"
>
> Hallada: "There is no brake on the rod."
>
> Hiney: "As long as we have to couple into the car we will shove it in and spot it and leave the brake on."
>
> Hallada: "O.K. Back up."

Brakeman Offerdahl corroborated the above conversation. (R. 385, f. 2) Respondent denied having said "Back up." (R. 112, f. 1)

Respondent, who had been standing on the ground at the southeast end of the flat car (R. 288, f. 2), then got on the flat car at the southeast end and started to operate the hand brake, which was an upright staff and wheel extending upward from the floor of the flat car (R. 53, f. 3; R. 54, ff. 1 and 2). Respondent testified that while he was operating the brake wheel he heard the noise of an oncoming car in back of him, that he then held on tight to the wheel, and that then there was a sudden and violent impact. He testified:

> "That car lunged forward—I got a sudden violent and terrific impact and lunged forward and it threw me backward and I hung onto the wheel and I went forward and smashed into the plank, about eight foot plank, and it threw me right back and I landed sort of across the track somewhere in between, and I kicked and sort of darkened out a little bit, and I found myself about five or six feet on the right-of-way of the railroad." (R. 55, f. 2)

The evidence shows that the cars came together at 4 miles per hour (R. 293, f. 3), or from 2 to 4 m.p.h. (R. 386, f. 3) and that two miles or 2 to 4 miles per hour was a permissible speed (R. 280, f. 2; R. 489, f. 2).

The following parts of Petitioner's Safety Rules (Plf. Ex. 17) were received in evidence:

> Rule 101: "Never give signal to move engine or cars while an employee is between the cars."
>
> Rule 140: "Do not swing on brake wheel or club at moment coupling is being made with car on which you are riding."

Respondent was not run over by the car but he sustained a compound, comminuted fracture of the upper right arm and possibly a very mild compression fracture of the eighth thoracic vertebra. He was hospitalized and twenty-four hours later his right arm was surgically amputated leaving a stump of about 4 inches. At the trial he testified to various subjective complaints of pain.

Evidence as to Couplers

The drawbars on the flat car and the box car were designed to have a lateral play or movement of 3 inches to either side. This design permits movement of the car around curved tracks and permits manual adjustment of the drawbars where such adjustment becomes necessary (R. 489-491).

The couplers on the flat car and the westerly box car had coupled on impact when the two cars were located on the *straight* elevator track near the stock pile (R. 382). They had uncoupled properly when they were uncoupled on the *straight* No. 1 track east of the switch in making the kick movement of the flat car (R. 416). Three witnesses for re-

spondent testified that if a coupling does not occur automatically on impact the failure could be due to a rusty pin or other defect in the coupler (R. 305, 328, 342). After the accident the two couplers involved were inspected by petitioner's car inspectors and found to be in good working order (R. 371, f. 2).

Petitioner's witness Van Steinberg (R. 489-496), the respondent himself (R. 140), and his witness Graham (R. 317,-320) all testified that the drawbars must be properly aligned or adjusted when a coupling is intended to take place between two cars situated on a curved track. When the flat car was stopped with its east end at the frog of the switch and the box car was moved against it from the No. 1 track, the two cars were standing on a *curved* track. The extent of the curve is shown by photographs received in evidence as Defendant's Exhibits F and G. Witness Van Steinberg demonstrated that the effect of their respective positions on the curved track would be to swing the end of each car, and with it the coupler, to an off-center position where they would not be in proper alignment for coupling (R. 494-495). Under these circumstances it is necessary to manually align or adjust the drawbars within the 6 inch normal side play permitted.

The evidence is conclusive that, while the knuckles of both couplers were open, the drawbars had not been adjusted or aligned preparatory to the attempted coupling on the curved track (R. 416, f. 3; R. 417, f. 1).

How Federal Questions Were Raised

1. The question of whether the failure to properly set and align the drawbars to compensate for the curvature of the

track on which the coupling was attempted was a good defense to the alleged violation of the Safety Appliance Act was raised in the following manner:

After both parties had rested petitioner moved the trial court for a directed verdict in the cause of action involving the coupler provisions of the Safety Appliance Act on the ground that it appeared conclusively from the evidence in the case, that there was no violation of the Act and also on the ground that under the evidence a violation of the Act, if any, was not a proximate cause of the accident as a matter of law (R. 537-538). These motions were denied (R. 539, f. 3). These same grounds were urged in petitioner's Motion for Judgment Notwithstanding the Verdict (R. 633-634). The motion was denied by the trial court without commenting specifically on this question (R. 644-647).

Under the Minnesota practice (See Rule VIII(e) Rules of Supreme Court of Minnesota) petitioner submitted this question to the Minnesota Supreme Court under Assignments of Errors numbered 1, 2, 3 and 16 as contained in Appellant's Brief to that Court. (See Appendix pages 32A and 35A.) The Minnesota Supreme Court in its decision and opinion of February 25, 1955, passed upon and decided this question against petitioner as follows:

> "The defendant contends that whenever a coupling is attempted on a curve a failure to adjust the drawbars is likewise a good defense under the Federal Safety Appliance Act.
>
> * * *
>
> "We therefore hold that, although the failure of couplers to couple automatically upon impact does not constitute a violation of the Federal Safety Appliance Act unless one of the coupler knuckles is open, it is no defense that the failure to couple upon impact is caused by

a misalignment of the drawbars." (Appendix p. 10A and 11A.)

2. The question of whether the failure of the trial court to separate and distinguish the negligence count and the safety appliance count, particularly as to the different effect of contributory negligence in the one as compared to the other, required the granting of petitioner's motion for a new trial was raised in the following manner:

After both parties had rested a conference was held in chambers at which time it was recognized by the trial court and by both counsel that two different causes of action were involved in the case (R. 539, f. 3 to R. 540, f 2). At that time counsel for petitioner called the trial court's attention to the rule announced by this Court's decision in *O'Donnell v. Elgin J. & E. R. Co.*, 338 U. S. 384 as follows:

> "Mr. Westphal: There are two. The Supreme Court of the United States has held that in that type of situation where you have got both the safety appliance act and the negligence act intermingled in an action the two must be clearly separated in the instructions to the jury, and it is for that reason that I submit a request for special interrogatories."

The special interrogatories requested are set forth on pages 33A and 34A of the Appendix hereto and would have required the jury to answer three separate and specific questions in each cause of action.

The trial court instructed the jury on the two issues of liability and on contributory negligence as set forth at pages 604 f. 3 to 608 f. 1 of the Record. (See Appendix pages 29A to 31A.) Petitioner duly excepted to the charge as follows (R.610-612):

"Mr. Westphal: Defendant excepts to the charge as a whole on the ground that it failed to clearly distinguish and separate the two different claims, one under the safety appliance act and the other under ordinary negligence, and because the charge as a whole failed to impress upon the jury the necessity of keeping the two claims or causes of action separate in so far as the application of the rules of contributory negligence are concerned.

"The defendant excepts to that part of the Court's charge as to the effect of contributory negligence on the part of the plaintiff, on the ground that it commingled the two in the charge so that the jury does not have an adequate understanding of the application of the two effects of contributory negligence. * * *

"The defendant also excepts to the failure of the Court to submit its requested special interrogatories numbered 1 through 6."

In petitioner's motion to the trial court for a new trial these alleged errors in the charge were assigned as grounds for a new trial. (See Record pages 640-641, Assignments 4(e) through 4(m) inclusive.) These assignments of error were rejected by the trial court's order without specific comment (R. 644-647).

Under the Minnesota practice petitioner assigned these alleged errors in its Assignments of Error, numbered 5, 6 and 7 through 11, contained in its Appellant's Brief to the Minnesota Supreme Court. (See Appendix pages 32A to 34A.)

The Minnesota Supreme Court in its opinion and decision of February 25, 1955 held:

"The charge to the jury did not distinguish and separate the two causes of action as clearly as should have

been done; nevertheless, taking the charge as a whole we cannot say that the jury was misled as to either negligence or contributory negligence with respect to either of the causes" (Appendix p. 14A).

The court also held that there was no abuse of discretion in refusing to submit petitioner's requested special interrogatories.

3. The question of whether the unreasonableness and excessiveness of the verdict together with the manifest sources of passion and prejudice on the part of the jury required a new trial was raised as follows:

At the trial photographs showing the exposed upper part of respondent's body including the stump of his arm were received in evidence (R. 160—Plaintiff's Exhibits 4, 5 and 6). Thereafter, respondent's witness Dr. Bratrud was asked to demonstrate on respondent's person his inability to wear a usable artificial arm (R. 204-206). Petitioner objected to the demonstration and while the objection was pending before the court, Dr. Bratrud went right ahead and grabbed the stump of the arm with considerable force causing the respondent to flinch and cry out with pain (R. 207). The trial judge, in chambers, referred to this in the following language:

> "The maneuver out there was much more objectionable I think than the sight of the body would be" (R. 208).

During the testimony of respondent's wife, who was visibly pregnant, she wept hysterically on the witness stand and several jurors wept with her (R. 345, 643).

The jury returned a verdict for respondent of $170,154.81 (R. 616). Petitioner moved the trial court for a new trial

on the grounds of "excessive damages appearing to have been given under the influence of passion or prejudice" (R. 639). The motion was denied and the trial judge approved the verdict in its full amount (R. 644-647). Upon appeal and proper assignment of error (R. 672) (See Appendix p. 34A, assignment number 15), the Minnesota Supreme Court held as a matter of law that the verdict was unreasonable and excessive by $65,154.81 and ordered a conditional remittitur to $105,000. It stated that it found no evidence of passion and prejudice. (See opinion Appendix p. 25A.)

Petitioner then petitioned for a re-hearing (R. 853) on the grounds that the Minnesota Supreme Court, by finding that the verdict was unreasonable and excessive by the amount of $65,154.81 and that the jury had been mis-led by the argument on damages by respondent's counsel, had in legal effect found that the jury verdict was tainted by passion and prejudice and that, therefore, the court, under the rule in F.E.L.A. cases, should have granted an unconditional new trial instead of merely reducing the verdict. (See Appendix p. 35A.) The Minnesota Supreme Court's decision of April 1, 1955 denied petitioner's request for a re-hearing on this ground. (Appendix p. 25A.)

The above questions were embodied in petitioner's appeal from the trial court's judgment dated April 11, 1955. (See Order of Minnesota Supreme Court dated April 20, 1955, R. 880.) By its decision of June 10, 1955 the Minnesota Supreme Court affirmed the judgment relying on its previous opinions of February 25 and April 1, 1955.

Reasons for Granting the Writ

1. A determination of the first question presented is important in the administration of the Federal Employers' Liability Act and the Safety Appliance Act since the decision is in conflict with the principle announced by this Court in *Affolder v. N.Y.C. & St. L.*, 339 U.S. 96. The prior decisions of this court construing the Safety Appliance Act have established these principles to be followed in applying the coupler provisions of the Act:

> 1. There are two recognized methods of proving a violation of the Act; one, to prove some particular defect in the coupler; the other, to prove a failure of the coupler to function upon impact. See *Myers v. Reading Co.*, (1947) 331 U.S. 477, 483.
>
> 2. A failure to couple upon impact is a violation of the Act, *provided*, the coupler was placed in a position to operate on impact. See *Affolder v. N.Y.C. & St. L.R. Co.*, (1950) 339 U.S. 96, 99.

In the instant case there was no proof of a particular defect in the couplers of either the flat car or the box car. In fact, respondent testified that he saw no defect (R. 150, f. 2) and the car inspectors found the couplers to be in good working condition when they made their inspection after the accident (R. 371, f. 2). Therefore, respondent in claiming a violation of the Act relied solely upon the failure to couple upon impact at the time of the injury. Under the principle announced in the *Affolder* Case this failure to couple is not a violation of the act if the couplers were not in position to operate upon impact.

Petitioner's contention is that the evidence conclusively shows that the couplers were not in a position to couple auto-

matically upon impact because of a failure to adjust or align the drawbars to compensate for the curvature in the track prior to the coupling, and that, therefore, there was no violation of the Act. In this connection it must be borne in mind that the improper position or misalignment of the couplers was not due to any defect in the couplers, such as excessive wear. In other words there was not a mechanical misalignment resulting from a defect, but a functional misalignment resulting wholly from the position of the cars on a curved track. To further illustrate the distinction it should be borne in mind that since the flat car and the box car were uncoupled on the straight No. 1 track in making the kick movement, their respective couplers or drawbars would be in the normal center position. But when the flat car had come to a stop at the frog of the switch the effect of the curved track was to swing the east *end* of the flat car away from the center of the track (R. 506). Likewise, the west *end* of the box car would swing in the opposite direction away from the center of the track as the box car moved from the straight track onto the curved track at the switch, since the west wheels would be on one track and the east wheels would be on another track (R. 506). The effect of the ends of the cars swinging away from center is to misalign the drawbars even though the drawbars remain in the center position at the end of the car (R. 506). In such a situation, according to the testimony of the respondent, his witnesses and witness Van Steinberg, it is necessary to adjust the alignment of the drawbars before attempting to make the coupling (R. 495, f. 2). The drawbars must be intentionally adjusted from the center alignment to an alignment which will compensate for the effect of the curved track.

Nor does the fact that this adjustment of the alignment is necessary mean that there is *ipso-facto* a violation of the Act. The Act does not require drawbars which automatically align themselves to compensate for a curvature in the track any more than it requires the couplers to have knuckles which automatically open themselves prior to an attempted coupling.

Any deficiency in the alignment of the couplers, at the most, would constitute ordinary negligence. This issue of ordinary negligence was not litigated in the case. Moreover, there was no evidence as to whether it was respondent's duty to align the couplers or whether that duty was on some other member of the crew.

While the Minnesota Supreme Court conceded that under the *Affolder* decision a failure to have at least one of the two knuckles open would have constituted a good defense, it expressly held that a failure to properly set the couplers by adjusting the alignment was not a good defense. The Minnesota Court refused to apply the principle of the *Affolder* decision beyond the specific facts of that case. In so holding the court below erred.

The question of whether a functional (rather than *mechanical*) misalignment of a coupler is a good defense to an alleged violation of the Act was decided in principle by the decision in the *Affolder* Case wherein this court stated:

> "* * * 'a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong * * *.'
>
> "Of course, this assumes that the coupler was placed in a position to operate on impact. Thus, if 'the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been properly opened' the railroad had a good defense" (339 U.S. 99).

In the earlier decision in *Atlantic City R. Co. v. Parker,* (1916) 242 U.S. 56, a question similar to that presented in this case was also raised by the defendant railroad. Justice Holmes in writing the opinion for the court stated:

> "Some lateral play must be allowed to drawheads, and further, the car was on a curve which of course would tend to throw the coupler out of line. But the jury were warranted in finding that the curve was so slight as not to affect the case and in regarding the track as for this purpose a straight line. If couplers failed to couple automatically on a *straight* track it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that, in the absence of any explanation believed by them, the failure indicated the railroad had not fully complied with the law" (242 U.S. 59). (Italics supplied.)

The *Parker* decision implies, therefore, that if the curve is sufficient to throw the couplers out of line, the failure to couple on impact is not a violation of the Act, there being no specific defects in the coupler.

That the curved turnout at the switch between the No. 1 track and the elevator track could not be regarded as a straight track is conclusively established by the photographs, Defendant's Exhibits F and G, and by the uncontradicted testimony of Witness Van Steinberg (R. 495, f. 2 and 3).

The Minnesota Supreme Court in the instant case relied upon the decisions in the *Parker Case,* supra; *San Antonio & A. P. Ry. Co. v. Wagner* (1916), 241 U.S. 476; *Chicago, St. P. M. & O. Ry. Co. v. Muldowney,* 130 F. 2d 971; *Hampton v. Des Moines & Cent. R. Co.,* 65 F. 2d 899, and *McGowan v. Denver & R. G. W. R. Co.,* 244 P. 2d 628, in refusing to

apply the principle of the *Affolder Case* to a situation where the failure to couple results from a misalignment. But each of those cases involved a *mechanical* misalignment of the drawbars on a straight track rather than a *functional* misalignment on a curved track.

The importance of this point in the application of the Safety Appliance Act is evident. While the Act gives to the Interstate Commerce Commission the power to determine the standard height of drawbars (45 U.S.C. Sec. 5 and 12), thereby eliminating any possibility of a *vertical* misalignment, no legislation can be devised to eliminate the necessity of railroads using curved turnouts and switches, which cause a *horizontal* misalignment when cars are in certain positions on a curved track. It is imperative that this court exercise its discretionary jurisdiction in this case in order to eliminate the confusion which exists on the part of both the bar and the bench of the various state and federal courts with respect to the question of whether a mechanical misalignment of the couplers (as in the *Parker* and *Wagner* Cases, supra) or a functional misalignment (as in the instant case) is a failure of the device or merely a negligent human failure not in violation of the Safety Appliance Act.

2. Petitioner under its second question herein contests the legal sufficiency of the trial court's instructions to the jury on the issue of liability and contributory negligence when appraised in the light of this court's decision in *O'Donnell v. Elgin J. & E. R. Co.*, (1949), 338 U.S. 384. In that case this court announced that where actions based upon negligence and violation of the Safety Appliance Act are joined in one complaint and tried together "it is almost indispensable to an intelligible charge to the jury that a clear separation of the two kinds of actions be observed and impressed"

(338 U. S. 393). Petitioner contends that the separtion is important not only in order to distinguish between a non- negligence violation and a negligence claim, but also in order to distinguish between the effect of contributory negligence in the two types of action. While an employee's negligence operates in diminution of damages in the negligence case, it cannot be considered for that purpose if the Safety Appliance Act is violated.

Mindful of the need to separate the two causes of action in the charge, counsel for the petitioner in the instant case called the trial judge's attention to the point before the charge (R. 540, f. 1). Not only did petitioner separate its requested instructions but it requested the submission of special interrogatories directed at separating the two causes of action in the thinking of the jury. Despite these precautionary measures by counsel, the trial judge's charge, (see Appendix pages 29A to 31A), as found by the Minnesota Supreme Court, "did not distinguish and separate the two causes of action as clearly as should have been done; * * *." However, the Minnesota Supreme Court also stated that "nevertheless, taking the charge as a whole, we cannot say that the jury was misled as to either negligence or contributory negligence with respect to either of the causes."

It seems incongruous that the Minnesota Supreme Court could hold a verdict to be excessive by $65,154.81 and yet fail to find that the jury could have been misled by an admittedly erroneous charge which commingled and confused the law under which damages are to be diminished because of the employee's contributory negligence. (See especially that part of the charge appearing on page 31A of the Appendix.)

Any chance to save the verdict from reversal in an appellate court was lost when the trial judge refused to submit

the special interrogatories. Since the verdict was a general one, and since it could have rested on petitioner's negligence alone, the commingling of the charge on the effect of respondent's own negligence must have prejudiced the petitioner. The evidence of respondent assuming a dangerous position on the car, his verbal command to "back up" while he was in that position; and his violation of Safety Rule No. 148 (Plf. Ex. 17) provided ample basis for the jury to find respondent guilty of negligence which contributed to any negligence on petitioner's part in making a forceful coupling.

It has become almost standard practice to plead a "mongrel cause of action" involving both a negligence count and a Safety Appliance Act count. This court should grant this Writ to review the decision below because the trial court's instructions were admittedly in conflict with the principle of the *O'Donnell Case*. An admonition from this court that a proper charge to the jury in these cases can be enhanced by use of special interrogatories along with the general verdict would be of immeasurable value in helping to obtain a conscientious consideration of the case by the jury. Compare *Myers v. Reading Co.*, (1947) 331 U.S. 477, 481, where the use of a special verdict was of assistance in reinstating a general verdict for plaintiff.

3. The third question presented for review involves the failure of the Minnesota Supreme Court to grant petitioner a new trial under the principle of the decision in *Mpls. St. P. & S. S. M. Ry. Co. v. Moquin*, 283 U. S. 520, because the excessiveness of the verdict was manifestly tainted by passion and prejudice. In the *Moquin Case* this court held:

> "In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obvious-

ly such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."

The Minnesota Supreme Court in the instant case, after finding that the verdict of $170,154.81 was unreasonable and excessive by the amount of $65,154.81, stated:

"We find no evidence of passion and prejudice by the jury in arriving at its verdict. Apparently the excessive verdict resulted merely from reliance solely upon mathematical formulas without testing the reasonableness of the amount awarded from the standpoint of its over-all effect" (Appendix p. 25A).

Nevertheless, the Minnesota Supreme Court found that over one-third of the amount of the original verdict was improperly awarded by the jury to respondent. Whether that excess was due to a reliance upon erroneous mathematical formulae used by respondent's attorney or whether it was due to passion and prejudice attributable to the poignant scenes enacted before it is not of material consequence. In either event the result of the decision by the Minnesota Supreme Court is to find substantial impropriety or misconduct upon the part of the jury in awarding damages.

Where the record discloses a trial marred by incidents such as the squeezing of the amputated stump of the arm (Dr. Bratrud's "objectionable maneuver"), the hysterical weeping of the pregnant wife of the respondent, and the weeping of the jurors with her, it is unreasonable to ascribe a monstrous excessiveness of $65,154.81 to mathematical formulae. Apparently, both the trial court and the State Supreme Court chose to believe that a trial is conducted in a

statistical vacuum untouched by human commiseration for the injured.

The failure to vitiate the entire verdict is contrary to the principle of the *Moquin Case* and forces the railroad to pay a judgment based upon other than a verdict by an impartial jury.

The importance of this question to the administration of justice under the Federal Employers' Liability Act is of increasing significance in the light of the size of the verdicts awarded by today's juries. Therefore, this court should grant the writ requested and review the question presented herein. See *Union Pacific R. R. Co. v. Hadley,* 246 U.S. 330, 334 where, in an F.E.L.A. case, this court stated:

> "Beyond the question of attributing misconduct to the jury we are not concerned to inquire whether its reasons were right or wrong."

CONCLUSION

The petition for the writ should be granted.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

(1) The coupler provision of the Safety Appliance Act, 45 U.S.C. Section 2, reading as follows:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without necessity of men going between the ends of the cars."

(2) The Federal Employers' Liability Act, 45 U.S.C. Section 51 et seq., particularly Sections 51 and 53, reading as follows:

Section 51

> "Every common carrier by Railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate

or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Section 53

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

No. 153 STEARNS COUNTY Matson, J

WILLIAM E. HALLADA, JR.,
Respondent,

36378 vs.

GREAT NORTHERN RAILWAY,
Appellant.

Endorsed
Filed February 25, 1955
Frank Larkin, Clerk
Minnesota Supreme Court

SYLLABUS

1. The duty imposed by the Federal Safety Appliance Act (27 Stat. 531, 45 USCA, § 2) is absolute and wholly unrelated to any question of negligence.

2. The failure of couplers to couple automatically upon impact is of itself an actionable wrong under the Federal Safety Appliance Act but only if at least one of the couplers is in an open position so as to operate automatically on impact.

3. Although the failure of couplers to couple automatically upon impact does not constitute a violation of the Federal Safety Appliance Act unless one of the coupler knuckles is open, it is no defense that the failure to couple upon impact is caused by a misalignment of the drawbars.

4. A violation of the Federal Safety Appliance Act creates an absolute liability for damages *proximately caused* either *in whole or in part* by such violation.

5. The failure of couplers to function properly, which in turn results in sudden and violent car movements which throw brakemen off their balance, is a recognized proximate cause of injuries which are sustained when the brakemen are thrown off the cars upon which they are riding.

6. In an action under the Federal Safety Appliance Act, the contributory negligence of the injured employee is immaterial *unless it is the sole proximate cause* of his injury.

7. Pursuant to Rule 49.02 of Rules of Civil Procedure, the trial court, under the circumstances here existing, did not abuse its discretion in refusing to submit requested written interrogatories to the jury.

8. Where a claim for relief under the Federal Safety Appliance Act is joined with a negligence action under the Federal Employers' Liability Act, the two causes of action should be clearly distinguished and separated and the court should impress upon the jury the importance of distinguishing between the two causes.

9. Where the disability of the plaintiff involves an amputation of an entire limb, and even complications from other injuries, the testimony of witnesses with similar major amputations as to what they are individually able to do in their particular callings is admissible only in the exercise of a sound discretion, and in the exercise of that discretion the trial court must weigh the probative value of such testimony against the probability that it will mislead or prejudice the jury.

10. It is a matter of common knowledge and no evidence is required to establish the truth of the proposition that a man with only one arm, who is not otherwise disabled and who is otherwise qualified, is able to pursue certain gainful employment such as that of a salesman.

11. The granting of a new trial because of misconduct of the prevailing party, his witnesses, or of his counsel, rests within the discretion of the trial judge and will not be reversed unless there is an abuse of discretion.

12. In personal injury actions it is elementary that the injured party should be made financially *whole* by receiving monetary equivalent of the harm sustained by him, inclusive of his medical expenses, pain and suffering, past loss of earnings, and, where a permanent injury is inflicted, his future losses due to impaired earning capacity.

13. Mortality tables, based on the average life of a large group of persons, have considerable evidentiary value but they are neither decisive of the injured person's life expectancy nor of the number of years his earning capacity would have continued undiminshed had he not been injured.

14. The reasonableness of an award for damages can be appraised only in the light of the elementary principle that plaintiff should be given neither more nor less than a sum which leaves him financially "whole" to the same extent as he would have been had no injury occurred.

15. Whatever process is adopted in fixing an injured person's damages, the reasonableness of the lump sum awarded by the jury must in the last analysis be tested from the unitary standpoint of what total financial benefits that lump sum will reasonably confer upon the injured person as a means of making him financially "whole."

16. No verdict can be sustained unless it stands the test of reasonableness in the light of its over-all effect.

Reversed on condition.

OPINION

MATSON, JUSTICE.

In an action under the Federal Employers' Liability Act and the Federal Safety Appliance Act, defendant appeals from an order denying its motion for judgment notwithstanding the verdict or in the alternative for a new trial.

On October 16, 1952, plaintiff was a brakeman on one of defendant's freight trains traveling east from Devils Lake, North Dakota. The train reached Lakota, North Dakota, about 5:15 a.m. There the engine and two boxcars were uncoupled from the remainder of the train and used in switching operations. A flatcar was kicked westward onto a side track. Plaintiff boarded the flatcar for the purpose of stopping it with the hand brake at a storage pile located farther westward along the side track. The flatcar stopped prematurely, however, so that its east end was near the frog of the switch, thereby blocking passage along the track from which it had been kicked.

Thereafter, the acting foreman told plaintiff to check whether the brake was set on the flatcar. Plaintiff inspected the brake chain and reported that the brake was not set. In response to the acting foreman's direction, plaintiff again boarded the flatcar and began to take up the slack of the hand brake. The flatcar was to be shoved farther westward to the storage pile. Plaintiff testified that he intended to take up the slack on the wheel-operated hand brake near the east end of the flatcar and then move to the center of the car *before signaling the acting foreman* to shove the flatcar westward. The acting foreman, however, contends that plaintiff had previously told him verbally to go ahead and back up, which would mean that the two boxcars attached to the en-

gine could be moved westward in order to shove the flatcar to the storage pile along the side track.

While plaintiff was still attempting to take up the slack from the brake, he heard the noise of an oncoming car behind him. He grabbed the brake wheel and braced himself. The sudden impact from the collision of the oncoming cars and engine with the flatcar, without effecting a coupling, threw plaintiff forward and backward a couple of times before he lost his grip and was thrown to the railroad right of way.

Plaintiff lay on the right of way for 15 or 20 minutes. Then he walked to the depot where a doctor administered morphine to relieve the pain. He was next taken in an ambulance about 60 miles to a hospital at Grand Forks. On plaintiff's arrival at the hospital, his right arm was operated on in an effort to restore blood circulation which had stopped after the artery had been severed by the broken bones in the arm. This effort was unsuccessful; therefore, it was necessary to amputate plaintiff's arm the next day. A few days later, plaintiff complained of pain in his back. He was X-rayed and no bony damage was found by the railroad's doctor. Nevertheless, diathermy was administered to plaintiff's back. There was considerable hemorrhaging in the arm and extending under the chest muscles. Plaintiff remained in the hospital for 28 days.

At the time of the trial, the bone in the stump of plaintiff's right arm measured about two and half inches in length. Plaintiff cannot wear a usable artificial arm. He could, however, wear an artificial arm for the cosmetic purposes of filling out a coat sleeve. The objective findings of the doctors established atrophy of the right chest and shoulder muscles, amputation of the right arm, a very mild compression frac-

ture of the eighth thoracic vertebra, and muscle spasm or tightness in lower region of the lower thoracic and upper lumbar vertebra. Plaintiff's subjective symptoms are pain in his back, numbness in his buttocks, "phantom pain" where his right hand and arm used to be, and tenderness in the stump of his right arm. There was considerable discrepancy among the opinions of the doctors as to the probable duration of the pain of which plaintiff complained.

The jury awarded plaintiff a verdict of $170,154.81. Defendant moved for judgment notwithstanding the verdict or a new trial, and it appeals from the denial of this motion.

The issues arising on this appeal involve: (1) Whether the failure of two cars to couple upon impact, when both coupler knuckles are open, constitutes a violation of the Federal Safety Appliance Act; (2) negligence; (3) proximate cause; (4) whether the trial court erred in refusing to submit written interrogatories to the jury; (5) whether the charge to the jury was prejudicially erroneous for failure to separate and distinguish sufficiently plaintiff's claim for relief under the Federal Safety Appliance Act from his negligence claim under the Federal Employers' Liability Act; (6) alleged errors in the exclusion of evidence; (7) misconduct of plaintiff's expert witness; (8) alleged misconduct of plaintiff's counsel; (9) whether the verdict is excessive and whether same resulted from passion and prejudice.

1–2. The Federal Safety Appliance Act (27 Stat. 531, 45 USCA, § 2) provides that:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled

without the necessity of men going between the ends of the cars."

The duty imposed by this section is absolute and wholly unrelated to any question of negligence.[1] If the coupler is properly set and fails to couple on the particular occasion in question, it is immaterial to the determination of whether the Federal Safety Appliance Act has been violated whether the coupler functioned properly before or after the particular occasion in question.[2] In the instant case it is undisputed that the couplers failed to couple upon impact. The United States Supreme Court has held, however, that mere failure of couplers to couple upon impact does not necessarily constitute a violation of the Federal Safety Appliance Act.[3] Recently that court in the Affolder case made it clear that its statement that the failure of a coupler to couple upon impact is in itself an actionable wrong *assumes that the coupler was placed in a position to operate on impact.*[4] Since a decision is not authoritative beyond its operative facts, the general language of the Affolder case must be construed to mean nothing more than that the failure of couplers to couple upon impact is in itself an actionable wrong *only if at least one of the couplers is in an open position so as to operate on impact.* Thus, for instance, if the knuckles on both of the couplers

[1]Johnson v Chicago G. W. Ry. Co. 242 Minn. ——, 64 N. W. (2d) 372; Carter v. Atlanta &. St. Andrews Bay Ry. Co. 338 U. S. 430, 70 St. Ct. 226, 94 L. ed. 236; O'Donnell v. Elgin, J. &. E. Ry. Co. 338 U. S. 384, 70 S. Ct. 200, 94 L. ed. 187; Delk v. St. Louis & San Francisco R. Co. 220 U. S. 580, 31 S. Ct. 617, 55 L. ed. 590.

[2]Carter v. Atlanta & St. Andrews Bay Ry. Co. 338 U. S. 430, 434, 70 S. Ct. 226, 229, 94 L. ed. 236, 241.

[3]Affolder v. New York, C. & St. L. R. Co. 339 U. S. 96, 70 S. Ct. 509, 94 L. ed. 683.

[4]Affolder v. New York, C. & St. L. R. Co. 339 U. S. 96, 99, 70 S. Ct. 509, 511, 94 L. ed. 683, 688.

are closed and the cars fail to couple upon impact, the railroad has a good defense against liability under the Federal Safety Appliance Act because at least one knuckle must be open in order for the couplers to couple.[5]

3. The defendant contends that whenever a coupling is attempted on a curve a failure to adjust the drawbars is likewise a good defense under the Federal Safety Appliance Act. There is a distinction, however, between failure to couple because of misalignment and a failure because of closed knuckles. Knuckles are purposely opened and closed whereas the drawbar unintentionally becomes misaligned.[6] Misalignment may result from wear which causes more lateral play than is necessary to permit the rounding of curves.[7] An additional difference is that knuckles can be opened without going between the cars, whereas alignment is made by moving the drawbar which necessitates going between the cars.[8] In the light of these differences, it is well to keep in mind that one of the basic purposes of the act is to require the automatic coupling and uncoupling without the necessity of men going between the cars.[9]

In view of these facts and the prior decisions which have refused to absolve railroads from liability on a defense of

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[5]*Ibid.*

[6]McGowan v. Denver & R. G. R. Co. (Utah) 244 P. (2d) 628.

[7]See, San Antonio Ry. Co. v. Wagner, 241 U. S. 476, 36 S. Ct. 626, 60 L. ed. 1110; Atlantic City R. Co. v. Parker, 242 U. S. 56, 37 S. Ct. 69, 61 L. ed. 150; White v. Atchison, Topeka & Santa Fe Ry. Co. (Mo.) 244 S. W. (2d) 26.

[8]McGowan v. Denver & R. G. W. R. Co. (Utah) 244 P. (2d) 628.

[9]O'Donnell v. Elgin, J. & E. Ry. Co. 338 U. S. 384, 70 S. Ct. 200, 94 L. ed. 187; Hampton v. Des Moines & Cent. I. R. Co. (8 Cir.) 65 F. (2d) 899; Hohenleitner v. Southern Pac. Co. (C. C. D. Ore.) 177 F. 796; Holz v. Chicago, M. St. P. R. Co. 176 Minn. 575, 224 N. W. 241.

drawbar misalignment,[10] it would be illogical to defeat a basic purpose of the Federal Safety Appliance Act by extending the rule of the Affolder case beyond its authoritative scope and thereby to attribute to the United States Supreme Court an intent to reverse its prior holdings by an implication to be drawn solely from the generality of its language. We therefore hold that, although the failure of couplers to couple automatically upon impact does not constitute a violation of the Federal Safety Appliance Act unless one of the coupler knuckles is open, it is no defense that the failure to couple upon impact is caused by a misalignment of the drawbars.

Irrespective of how the Affolder case is interpreted, we must conclude upon the evidence herein that the jury was warranted in finding a violation of the Federal Safety Appliance Act. The degree to which a drawbar must be misaligned before there is a failure to couple upon impact depends on the sharpness of the curve, the alignment of the other drawbar, the extent to which the knuckles are open, and whether only one or both knuckles are open.[11] When the knuckles on both drawbars are open, the alignment does not have to be as close as when only one knuckle is open.[12] The evidence in the record shows that the knuckle on the east end of the flatcar and the knuckle on the west end of the boxcar were both open. It also shows that the curve was slight so as not to greatly affect alignment and further that only 15 feet east of the east end of the flatcar the track was straight.

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[10]See, Atlantic City R. Co. v. Parker, 242 U. S. 56, 37 S. Ct. 69, 61 L. ed. 150; San Antonio Ry. Co. v. Wagner, 241 U. S. 476, 36 S. Ct. 626, 60 L. ed. 1110; Chicago, St. P. M. & O. Ry. Co. v. Muldowney (8 Cir.) 130 F. (2d) 971; Hampton v. Des Moines & Cent. I. R. Co. (8 Cir.) 65 F. (2d) 899; McGowan v. Denver & R. G. W. R. Co. (Utah) 244 P. (2d) 628.

[11]McGowan v. Denver & R. G. W. R. Co. (Utah) 244 P. (2d) 628.

[12]*Ibid.*

Under the circumstances the cars should have coupled upon the curve in question unless the couplers were defective. Upon such evidence the jury was warranted in finding a violation of the Federal Safety Appliance Act. Similar findings have been upheld upon similar evidence.[13]

4–5–6. A violation of the Federal Safety Appliance Act creates an absolute liability for damages *proximately caused* either *in whole or in part* by such violation.[14] Stated another way, the injured person may recover whether the defective equipment used in violation of the act was the sole or only a contributing cause of his injury.[15] The evidence herein sustains a finding that, if the couplers had coupled upon impact as required by the act, much of the slack would thereby have been taken up and the violent jerk normally caused by such colliding cars would have been neutralized. The couplers failed, however, to couple upon impact, and the car on which plaintiff was standing was consequently thrown forward with such great force and violence that it would have been difficult for any person, situated as plaintiff then was, to maintain his balance and not be thrown off the car. The failure of couplers to function properly, which in turn results in sudden and violent car movements which throw brakemen off their balance, is a recognized proximate cause of injuries which are sustained when the brakemen are thrown

[13]Atlantic City R. Co. v. Parker, 242 U. S. 56, 37 S. Ct. 69, 61 L. ed. 150; San Antonio Ry. Co. v. Wagner, 241 U. S. 476, 36 S. Ct. 626, 60 L. ed. 1110; White v. Atchison, Topeka & Santa Fe Ry. Co. (Mo.) 244 S. W. (2d) 26.

[14]Carter v. Atlanta & St. Andrews Bay Ry. Co. 338 U. S. 430, 70 S. Ct. 226, 94 L. ed. 236; Coray v. Southern Pac. Co. 335 U. S. 520, 69 S. Ct. 275, 93 L. ed. 208; Johnson v. Chicago G. W. Ry. Co. 242 Minn. ——, 64 N. W. (2d) 372.

[15]Coray v. Southern Pac. Co. 335 U. S. 520, 523, 69 S. Ct. 275, 277, 93 L. ed. 208, 210.

off the cars upon which they are riding.[16] A railroad's liability to an employee for injuries sustained in the performance of his duties as a proximate result of a violation of the Federal Safety Appliance Act comes into full play despite the fact that the employee when injured was not actually engaged in coupling or uncoupling cars.[17] The presence or absence of either care or negligence of a defendant carrier is wholly immaterial in establishing liability for a violation of the act.[18] Likewise, the contributory negligence of the injured employee is immaterial unless it is the sole proximate cause of his injury.[19] Upon the evidence herein and in the light of these principles, it is clear that the violation of the act was a proximate cause of plaintiff's injuries.

If we assume that the jury based its verdict on negligence under the Federal Employers' Liability Act, the verdict must nevertheless be sustained since upon the conflicting evidence the jury could reasonably find that defendant's negligence was the sole and proximate cause of plaintiff's injuries.

7. The trial court did not abuse its discretion in refusing to submit to the jury defendant's requested written interrogatories with the appropriate forms for a general verdict. Rule 49.02 of Rules of Civil Procedure provides that:

> "The court may submit to the jury, together with appropriate forms for a general verdict, written interroga-

[16]See, Louisville & Nashville R. Co. v. Layton, 243 U. S. 617, 37 S. Ct. 456, 61 L. ed. 931; Ross v. Duluth, M. & I. R. Ry. Co. 203 Minn. 312, 281 N. W. 76, 271; Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66, 37 S. Ct. 598, 61 L. ed. 995.

[17]Louisville & Nashville R. Co. v. Layton, 243 U. S. 617, 37 S. Ct. 456, 61 L. ed. 931; Clapper v. Dickinson, 137 Minn. 415, 163 N. W. 752.

[18]O'Donnell v. Elgin, J. & E. Ry. Co. 338 U. S. 384, 70 S. Ct. 200, 94 L. ed. 187; Johnson v. Chicago G. W. Ry. Co. 242 Minn. ——, 64 N. W. (2d) 372.

[19]Carter v. Atlanta & St. Andrews Bay Ry. Co. 338 U. S. 430, 70 S. Ct. 226, 94 L. ed. 236.

tories upon one of more issues of fact the decision of which is necessary to a verdict."

This portion of the rule is substantially in accord with Minnesota practice prior to the adoption of the rules of civil procedure.[20] Under our prior practice it was discretionary with the trial court to decide whether to submit interrogatories with a general verdict.[21] Federal Rule 49(b) is identical with our Rule 49.02. In construing Federal Rule 49(b), the courts have likewise left the submission of written interrogatories in civil jury cases to the judge's discretion.[22] There may be situations in which the refusal to submit written interrogatories would be an abuse of discretion.[23] We find no reason to hold that the trial judge abused his discretion in refusing to submit defendant's requested interrogatories, especially since the record fails to indicate that any prejudice resulted.

8. The charge to the jury did not distinguish and separate the two causes of action as clearly as should have been done; nevertheless, taking the charge as a whole we cannot say that the jury was misled as to either negligence or contributory negligence with respect to either of the causes. Where a claim for relief under the Federal Safety Appliance Act is joined with a negligence action under the Federal Employers' Liability Act, the two causes of action should be clearly dis-

[20]See, 2 Youngquist & Blacik, Minnesota Rules Practice, p. 492.

[21]Roske v. Ilykanyics, 232 Minn. 383, 45 N. W. (2d) 769.

[22]Skidmore v. Baltimore & O. R. Co. (2 Cir.) 167 F. (2d) 54.

[23]In 5 Moore, Federal Practice (2 ed.) par. 49.05 it is stated: "* * * There are cases in which a proper exercise of its discretion under Rule 49 would prompt the trial court to require a special verdict or a general verdict accompanied by interrogatories, such as cases in which complex instructions would otherwise have to be given to the jury, or in which there is a likelihood of costly errors on the part of the court and the jury, or in which the facts to be determined are complicated or technical."

tinguished and separated and the court should impress upon the jury the importance of distinguishing between the two causes.[24] The claim arising from a violation of the Federal Safety Appliance Act is in no way dependent upon negligence; whereas, an action brought under the Federal Employers' Liability Act requires a showing of negligence.[25] Under the former, contributory negligence is immaterial unless it is the sole proximate cause of plaintiff's injuries; whereas, under the latter, contributory negligence goes to a proportionate diminution in the amount of damages.[26] Certain issues such as causation and the nature and extent of the injuries are, however, common to both actions.[27] Taking the charge as a whole, and all charges should be so construed, we find no prejudicial error.

9. Defendant alleges that the trial court erred in excluding the testimony of two witnesses, one of whom, like plaintiff, had sustained a high arm amputation. The testimony of the amputee witness was offered to show that a person who has lost the use of an arm can rehabilitate himself so as to be able to perform gainful employment, do odd jobs, participate in sports, drive a car, and clothe, bathe, and feed himself. The other witness, a beauty supply firm manager would have testified that the loss of an arm does not of itself disqualify a person from performing work as a salesman of beauty supply products. Although evidence in mitigation of damages is

[24]O'Donnell v. Elgin, J. & E. Ry. Co. 338 U. S. 384, 70 S. Ct. 200, 94 L. ed. 187.

[25]*Ibid.*

[26]Tiller v. Atlantic Coast Line R. Co. 318 U. S. 54, 63, 67, 63 S. Ct. 444, 449, 451, 87 L. ed. 610, 615, 617, 143 A. L. R. 967; Johnson v. Chicago G. W. Ry. Co. 242 Minn. ——, 64 N. W. (2d) 372.

[27]O'Donnell v. Elgin, J. & E. Ry. Co. 338 U. S. 384, 70 S. Ct. 200, 94 L. ed. 187.

generally admissible in a personal injury suit, no arbitrary rule of evidence can be formulated which is applicable to all situations and much must be left to the sound discretion of the trial court. In a case involving a switchman who had lost two phalanges of his thumb and three of the index finger on his right hand, we have held admissible the testimony of other switchmen—each with similar or greater hand injuries—that they were able to carry on their work as switchmen without much difficulty.[28] Upon the specific issue of whether the loss of certain fingers, or other members, prevents a person from performing the mechanical manipulations required in a certain occupation, the testimony of others similarly handicapped is admissible. Where, however, the disability involves the amputation of an entire limb, and even complications from other injuries, the testimony of witnesses with similar major amputations as to what they are individually able to do in their particular callings is admissible only in the exercise of a sound discretion. In the exercise of that discretion the court may consider a variety of factors such as whether the testimony is only cumulative of what has been otherwise established; whether its evidentiary contribution is too remote or conjectural to have any material probative weight;[29] whether it merely presents a matter of common knowledge with which a jury may be presumed to be familiar;[30] whether it involves a matter of which the court can take judicial notice and declare the truth of the proposi-

[28]Baird v. Chicago, M. St. P. & P. R. Co. 179 Minn. 127, 228 N. W. 552.

[29]See, Watre v. G. N. Ry. Co. 127 Minn. 118, 149 N. W. 18; 7 Dunnell, Dig. (3 ed.) § 3241.

[30]See, O'Conner v. Chicago, R. I. & P. Ry. Co. 144 Iowa 289, 122 N. W. 947; Greenway v. Taylor County, 144 Iowa 332, 122 N. W. 943.

tion without requiring evidence;[31] and whether between the injured claimant and the proffered witnesses with similar *physical* injuries there exists in other respects—with regard to the performance of the same occupation or other occupations—anything reasonably approaching a common denominator of health, training, personality, ability, and general aptitude. Obviously, by way, of example, what the average claimant suffering from a complete loss of eyesight can do by way of rehabilitating himself to perform his usual work, or to perform an entirely new occupation, is not to be measured by the testimony of a Helen Keller. Furthermore, the trial court must weigh the probative value of such testimony against the probability that it will mislead or prejudice the jury.

10. In applying these principles we cannot say that the trial court abused its discretion in excluding the testimony of the amputee witness. Defendant's medical experts had already expressed their opinion that plaintiff could perform the duties of a salesman, watchman, bookkeeper, or of an elevator operator. This testimony was introduced in part to show that plaintiff could engage in gainful employment without the use of his right arm. It follows that the excluded testimony of the amputee was merely corroborative of the doctors' testimony. Since such testimony was cumulative, it was within the discretion of the trial court to exclude it.[32] Furthermore, such testimony presented only a matter of common knowledge. No evidence is required to establish the truth of the proposition that a man with only one arm, who is not otherwise disabled and who is otherwise

[31]See, 9 Wigmore, Evidence (3 ed.) § 2565; 7 Dunnell, Dig. (3 ed.) § 3448.

[32]Johnson v. Crookston Lbr. Co. 92 Minn. 393, 100 N. W. 225; Mitton v. Cargill Elev. Co. 124 Minn. 65, 144 N. W. 434.

qualified, is able to pursue certain gainful employments such as that of a salesman. On similar grounds we cannot hold that it was an abuse of discretion to exclude the testimony of the beauty supply company manager to the effect that the loss of an arm does not of itself disqualify a person from being a salesman.[33] Insofar as the testimony of the beauty supply manager was offered to show that there is a labor market for a one-arm man as a salesman, assuming plaintiff had no other injuries, it was error without prejudice to exclude such testimony since it is common knowledge that a one-armed person may act as a salesman.

11. The granting of a new trial because of misconduct of the prevailing party, his witnesses, or of his counsel, rests within the discretion of the trial judge and will not be reversed unless there is an abuse of discretion.[34] The trial court is in a much better position than an appellate court to determine whether prejudice resulted.[35] We do not condone improper arguments of counsel or of a litigant's witnesses. The circumstances, however, surrounding the alleged misconduct are not such as to warrant our holding that the trial court abused its discretion in denying a new trial.

12–13. Defendant contends that excessive damages were awarded under the influence of passion and prejudice. The verdict was for $170,154.81. We turn first to the sole question of whether the verdict is excessive. Plaintiff's average monthly wage before the accident was $450. His loss of

[33]Testimony is admissible to show whether a reasonably stable employment market is available for an employee with certain specified disabilities. See, Lee v. Minneapolis St. Ry. Co. 230 Minn. 315, 41 N. W. (2d) 433.

[34]Willmar Gas Co. Inc. v. Duininck, 239 Minn. 173, 58 N. W. (2d) 197; Ryan v. International Harvester Co. 204 Minn. 177, 283 N. W. 129; 14 Dunnell, Dig. (3 ed.) § 7099b.

[35]Wyatt v. Wyett, 200 Minn. 106, 273 N. W. 600.

wages from the time of the accident to the time of the trial was $3,150. He was 30 years and 8 months of age when injured. According to the U. S. Life Experience Table of Mortality, a man 30 years old has a life expectancy of 38.80 years. Plaintiff has an eighth-grade education. Doctors testified that he might do the work of a watchman, elevator operator, bookkeeper, or a salesman. There was testimony that emotional make-up as well as physical ability is an important factor in considering whether plaintiff could be a salesman.

In personal injury actions it is elementary that the injured party should be made financially *whole* by receiving the monetary equivalent of the harm sustained by him, inclusive of his medical expenses, pain and suffering, past loss of earnings, and, where a permanent injury is inflicted, his future losses due to impaired earning capacity. In arriving at plaintiff's damages for impaired earning capacity, the jury must first determine from the evidence what the plaintiff normally would have earned during the rest of his life had he not been injured, deduct therefrom that sum which he may reasonably be expected to earn despite his injuries, and then reduce the remainder to its present worth.

In the case of permanent injuries, it is necessary, in order to ascertain the damages for impaired earning capacity, to determine the life expectancy of the individual at the time of the tort. For this purpose mortality tables, based on the average life of a large group of persons, have considerable evidentiary value but they are neither decisive of the injured person's life expectancy nor of the number of years his earning capacity would have continued undiminished had he not been injured. These tables are but one of several evidentiary factors to be weighed in ascertaining life expectancy as a preliminary step in the determination of earning expectancy.

Life expectancy and earning expectancy are not synonymous since a person may live longer than he is capable of pursuing gainful employment. In determining either of these expectancies, the jury is not permitted to simplify its task by accepting the mortality tables as an unerring guide since the plaintiff's physical condition and health as an individual must also be appraised. Was his physical condition and general health at the time of the tort better or worse than that of the average man of his age? Was he suffering from a serious malady likely to cut his life short or likely to remove him prematurely from the market of gainful employment? Would he have been subject to compulsory retirement at a certain age, and what effect, if any, would such retirement have had upon his earnings? How soon, if at all, would his earning capacity have been reduced by the infirmities of old age? Considering all his innate qualities, background, and training, what were his future prospects for an increase, or even a decrease, in his earning capacity? All relevant facts, though they be complex, must be considered lest only a part of the damage picture is seen.

Plaintiff's counsel seeks to sustain the amount of the verdict as reasonable by using substantially the same mathematical formula that he used in addressing the jury. This formula assumes that plaintiff's earning expectancy is the same as his life expectancy of 38.80 years. He also assumes that plaintiff would have been able to earn $450 per month for the full life expectancy period. He then calculates the present value of a monthly income of $450 for 38.80 years, at three percent, to be the sum of $124,557.22[36] Next he deducts

[36]This figure is not correct. Plaintiff's formula, in its inception, proceeds on the erroneous premise that lost future earnings and the proceeds of retained future earning capacity are both to be reduced to present value.

from this last figure the total earnings that he conceives plaintiff will earn during such life expectancy despite his injuries. He then assumes, by way of example, that plaintiff in his injured condition may be able to earn only $100 per month or a total of $28,160.87[37] for 38.80 years. After deducting this last figure we have a remainder of $96,396.35 as constituting the amount of damages plaintiff has sustained for loss of future earning capacity.

Counsel then, for illustrative purposes, varies the formula by assuming that plaintiff will earn $150 per month despite his injuries, and calculates his earnings for 38.80 years to be $38,402.41.[38] Deducting this sum from $124,557.22 we have a net remainder of $86,154.81 as the net damages sustained by plaintiff for loss of future earning capacity.

If we deduct from the jury's verdict of $170,154.81 the first figure of $96,396.35 (as damages for loss of future earning capacity) and the further sum of $3,150 (for wages lost between date of injury and date of trial) we have a net remainder of $70,608.46 as damages for present and future pain and suffering. On the other hand, if we assume that plaintiff will earn $150 a month despite his injuries and we deduct $86,154.81 (as damages for loss of earning capacity) and also $3,150 (for wages lost up to the time of trial) we have a net remainder of $80,850 for pain and suffering.

Under plaintiff's formula the net remainder, whether it be $70,608.46 or $80,850, necessarily represents damages for pain and suffering. Again, to justify the reasonableness of this amount, another mathematical formula is used which assumes that pain and suffering may be compensated for by

[37]This figure is also erroneous for the reasons stated in footnote 36.

[38]This figure is also erroneous for the reason stated in footnote 36.

the hour or the day. The daily rate being fixed, it is then assumed that the total damages for pain and suffering may be obtained by the simple process of multiplying such rate by the number of days in 38.80 years. Plaintiff argued to the jury that as high as $8 per day would be reasonable for pain and suffering or a total as high as $110,960 for the period of life expectancy.

14. These calculations illustrate how the jury was asked to arrive at its verdict of $170,154.81 and how this court is now asked to find that the verdict is reasonable. The reasonableness of an award for damages can be appraised only in the light of the elementary principle that plaintiff should be given neither more nor less than a sum which leaves him financially *whole* to the same extent as he would have been had no injury occurred. Whether an injured person has been made financially *whole* must be tested by determining what the total amount of damages awarded by the jury will accomplish for him if conserved and used with ordinary prudence.[39] Here we have a verdict of $170,154.81. If this sum is invested at three percent plaintiff will receive in interest alone an annual income of $5,104.64 or slightly less than his regular preinjury income of $5,400. If the money is invested at the reasonable rate of only three and one-fourth percent he will have an annual interest income of $5,530.03 or slightly more than his former income. When his life expectancy expires he will still possess the entire principal sum of $170,154.81. Over and above such annual interest income, he will admittedly, despite his injuries, enjoy a retained earning capacity of at least $100 or $150 per month. Such retained earning

[39]In Clay v. Chicago, M. & St. P. Ry. Co. 104 Minn. 1, 14, 115 N. W. 949, 955, we recognized that the investment value of a verdict is to be considered in determining the reasonableness of the amount awarded.

capacity will in 38.80 years yield him an aggregate sum of $46,560 at $100 per month or $69,840[40] at $150 per month.

Clearly a verdict of $170,154.81 is excessive. If we assume that the interest on such sum will equal his former income of $5,400, as it reasonably should, we find that plaintiff will enjoy for his full life expectancy—*from both retained earning capacity and interest*—a total annual income of either $6,600 or $7,200 per year. Plaintiff, upon the evidence herein, had no prospects for any material increase in his preinjury income. Without such prospects the substantial increase in income cannot be justified unless it is to be treated as compensation for pain and suffering. In addition to an increase from $1,200 to $1,800 per year in income, plaintiff will conclude his life expectancy with an estate of $170,154.81, or the full amount of the verdict. No recognized theory of damages or principle of common sense requires that plaintiff, *over and beyond his damages,* be endowed with an estate at the conclusion of his life expectancy. The income increase and the estate endowment go far beyond any reasonable compensation for pain and suffering. We must ever be careful lest an injured person is not made financially *whole* to the same extent as he would have been had he not been injured, but damages which grossly exceed or fall below full compensation cannot be permitted to stand.

15-16. The segmentation process of breaking the damage picture into fragments and then applying to each fragment a mathematical formula whereby damages are calculated at a fixed rate per day for the entire period of the injured person's life expectancy, though illuminating, may be misleading. An injured person's earning expectancy—both as to duration and

[40]As before noted, plaintiff erroneously reduced the amount of the proceeds of retained future earning capacity to its present value. See, footnote 36.

amount of income—cannot be ascertained by merely multiplying the number of days in a life expectancy by a fixed rate per day. Many other related and uncertain factors must be considered. Furthermore, pain and suffering which is subjective and which at its very worst usually varies from day to day cannot, with any finality, be estimated on a daily basis. Usually the jury is asked to use the worst hour or the worst day as a yardstick for evaluating pain. Whatever process is adopted in fixing an injured person's damages, the reasonableness of the lump sum awarded by the jury must, in the last analysis, also be tested from the unitary standpoint of what total financial benefits that lump sum will confer upon the injured person as a means of making him financially whole. No award can be sustained unless it stands the test of reasonableness in the light of its over-all effect.

There is no assurance that plaintiff's future earning capacity, had he not been injured, would have continued *uninterrupted* and *unimpaired* for his full life expectancy. Normally it would not have done so. Solely by way of illustration, and not as an estimate of lost earning capacity, it is to be noted that slightly less than $90,000 invested on an annuity basis at three percent would permit plaintiff to withdraw therefrom a monthly income of $325 for his entire life expectancy.[41] At whatever figure plaintiff's future income is established as a replacement for lost earning capacity, it is not to be overlooked that in addition to that income he will also receive a valuable and additional benefit in the form of income protection from the misfortunes of unemployment from illness and other causes.

[41]For annuity value and mortality tables, see 43 M. S. A., pp. 747 to 758; 58 C. J. S., Mortality Tables, pp. 1211, 1212.

We find no evidence of passion and prejudice by the jury in arriving at its verdict. Apparently the excessive verdict resulted merely from reliance solely upon mathematical formulas without testing the reasonableness of the amount awarded from the standpoint of its over-all effect.

The order appealed from is reversed and a new trial is granted unless, within ten days after the filing of the remittitur in the court below, the plaintiff shall file a written consent that the verdict be reduced to the sum of $105,000. In the event that such consent is filed within the time stated, the order shall be and is affirmed.

Reversed on condition.

No. 153 STEARNS COUNTY Per Curiam

WILLIAM E. HALLADA, JR.,

Respondent,

36378 vs.

GREAT NORTHERN RAILWAY,

Appellant.

Endorsed
Filed April 1, 1955
Frank Larkin, Clerk
Minnesota Supreme Court

UPON PETITION FOR REARGUMENT

The petition for reargument is denied in its entirely both as to the request for a new trial on the ground of passion and prejudice and as to the request that the decision be amended to provide specifically that interest shall be allowed

only from the date of the filing of the written consent to a reduction of the verdict to $105,000.

Where a new trial is granted unless the plaintiff consents to a reduction in the amount of the verdict to a specific amount, and the plaintiff so consents, he is entitled to interest on the amount of the verdict as reduced from the time the verdict was originally rendered, *unless the mandate of the appellate court clearly excludes such interest.* See, M. S. A. 549.09; Rasmussen v. Milwaukee E. R. & T. Co. 261 Wis. 579, 53 N. W. (2d) 442; Piper v. Epstein, 326 Ill. App. 400, 62 N. E. (2d) 139; Palmer v. Bank of Zumbrota, 72 Minn. 266, 75 N. W. 380; Martin County Bank v. Bird, 90 Minn. 336, 96 N. W. 915. In full recognition of the discretionary power of this court to allow or not to allow interest on a verdict as reduced, we see no reason for modifying the original opinion so as to deny plaintiff his interest on the reduced amount from the time the original verdict was entered.

Petition for reargument denied.

No. Sp. STEARNS COUNTY Per Curiam

WILLIAM E. HALLADA, JR.,

Respondent,

36370 vs.

GREAT NORTHERN RAILWAY COMPANY,

Appellant.

Endorsed
Filed June 10, 1955
Frank Larkin, Clerk
Minnesota Supreme Court

PER CURIAM.

Appeal from a judgment. The case was here before on an appeal from an order denying defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial. Our opinion filed February 25, 1955, affirmed the order appealed from if plaintiff within ten days after the filing of the remittitur in the lower court shall file his written consent to a reduced verdict in the sum of $105,000. Hallada v. G. N. Ry. Co. —— Minn. ——, 69 N. W. (2d) 673. Within the ten day period plaintiff filed his written consent to a reduction of the verdict. For the reasons given in the previous opinion the judgment appealed from is affirmed.

STATE OF MINNESOTA, SUPREME COURT

WILLIAM E. HALLADA, JR.,

Respondent,

36670 VS.

GREAT NORTHERN RAILWAY COMPANY,

Appellart.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Stearns, be and the same hereby is in all things affirmed.

Dated and signed June 21, 1955.

BY THE COURT

Attest:

Frank Larkin, Clerk

EXCERPT OF COURT'S CHARGE ON LIABILITY

(Quoted from pp. 604-608 of Record)

It is the law that every common carrier by railroad shall be liable in damages to any person suffering injury while in its employ if such injury results in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, plants, tracks, roadbed or other equipment. The law further provides that if the injured employee is found guilty of negligence, referred to as contributory negligence, that fact alone shall not bar recovery but that the judgment shall be diminished in that event by the jury in proportion to the amount of such negligence attributable to such employee.

It is the law that no such employee shall be held to have been guilty of contributory negligence in any case where a violation by the carrier of any statute enacted for the safety of employees contributed to the injury.

It is the law that it shall be unlawful for any carrier so engaged to haul or permit to be hauled or used on its line any car not equipped with couplers coupling automatically by impact and which can be coupled without the necessity of men going between the ends of the cars. Before a failure to couple establishes a defective coupler it must be found that it was properly set so it could couple. If it was not adjusted as such automatic couplers must be, of course, the failure is not that of the device.

As to the two separate causes of action which you will consider in your jury room, in the first place the plaintiff claims that there was a defective coupler and that it failed to couple automatically on impact when properly set, that

the impact was therefore greater than it would have been had the coupler functioned properly and that that was the proximate cause of plaintiff's injuries. If you find that the cars failed to couple automatically because the coupler was not set properly, then you must find that the defendant did not violate this particular law, and in that event that cause of action is out of the case. In other words, if you find that the two couplers were properly set for coupling but that they failed to couple automatically by impact, then plaintiff's contributory negligence is out of the case and any damages awarded to him would not be diminished because of negligence on his part. A failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong in no way dependent upon negligence and for the proximate results of which there is liability, a liability that cannot be escaped by proof of care or diligence.

With respect to the first cause of action, plaintiff contends that there was this defective coupler which did not function in the manner required by law, which law I have already given you. If you find that true, then if such defective coupler was the proximate cause, that in itself would create a liability and you would come to the question of damages. If, on the other hand, you find that there was no such defective coupler, then that claim of the plaintiff would be out of the case and you would proceed to consider the second claim, the claim of negligence. The second claim is that irrespective of the coupler the defendant was negligent in a manner proximately resulting in plaintiff's injury, and that plaintiff was not guilty of contributory negligence. Defendant alleges that plaintiff was negligent and that his negligence was the sole and proximate cause of the accident. Defendant has the burden of proof as to that allegation. It contends I believe

that Mr. Hiney said to Mr. Hallada, the plaintiff, substantially: "Leave the brake set," or "You set the brake and we will push it in," or "we will shove it in," and that plaintiff replied, "Okay, back her up," and that plaintiff then placed himself in a place of danger knowing that an impact was about to occur. You will be governed by the evidence and not by my recollection of the evidence. I am simply referring to it in that manner in order to direct your attention to it. I may not have it entirely correct. Plaintiff denies any such conversation. If the defendant was negligent and if that negligence was a proximate cause of the accident, then you will come to the question of damages. If plaintiff was also negligent and if his negligence contributed proximately to the accident, then you will diminish any award of damages you may make in proportion to the amount of such negligence attributable to such employee. If you find from the evidence that plaintiff was guilty of contributory negligence and that his negligence was the sole and proximate cause of the accident, then, of course, your verdict will be for the defendant because you cannot find for the plaintiff unless you find in the first cause of action the presence of a defective coupler or find in the second cause of action negligence on the part of the defendant which was the proximate cause of the accident. If you find that plaintiff himself was negligent but fail to find that his negligence was the sole and proximate cause of the accident because you also find that defendant was negligent and that its negligence contributed proximately along with the negligence of the plaintiff to cause the accident, then it is your duty to reduce the amount of damages awarded plaintiff to the extent that plaintiff's negligence contributed to the happening of the accident or injury.

EXCERPTS FROM APPELLANT-DEFENDANT'S ASSIGNMENTS OF ERROR AS CONTAINED IN APPELLANT'S BRIEF TO MINNESOTA SUPREME COURT AT PAGES 665 THROUGH 672 OF RECORD

1. The court erred in denying defendant's motion for a directed verdict on the coupler count made on the ground that there was no evidence of a violation of the coupler provision of the Safety Appliance Act (45 U. S. C. Sec. 2). (R. 539, f. 3).

2. The court erred in denying defendant's motion for a directed verdict on the coupler count made on the ground that a violation of the coupler provisions of the Safety Appliance Act was not a proximate cause of the accident (R. 539, f. 3).

3. The court erred in denying defendant's motion for judgment notwithstanding the verdict on the coupler count on the same grounds stated in assignments of error number 1 and 2 (R. 644, f. 3).

4. The court erred in denying defendant's motion for judgment notwithstanding the verdict on the general negligence count on the grounds that plaintiff's negligence was the sole negligence proximately causing the accident (R. 644, f. 3).

5. The court erred in its instructions to the jury on the law applicable to the coupler count and to the general negligence count, as set forth at pages 604 folio 3 to 608 folio 1 of the Record, in that neither said portion of the charge nor the charge as a whole clearly distinguished and separated the two different counts and did not impress upon the jury

the necessity of keeping the two counts separate in so far as the application of the rules of contributory negligence are concerned, as duly excepted to at the conclusion of the charge (R. 610, f. 3).

6. The court erred in its instructions to the jury in charging the jury as follows:

> "It is the law that every common carrier by railroad shall be liable in damages to any person suffering injury while in its employ if such injury results in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, plants, track, roadbed or other equipment. The law further provides that if the injured employe is found guilty of negligence, referred to as contributory negligence, that fact alone shall not bar recovery, but that the judgment shall be diminished in that event by the jury in proportion to the amount of such negligence attributable to such employe.
>
> "It is the law that no such employe shall be held to have been guilty of contributory negligence in any case where a violation by the carrier of any statute enacted for the safety of employes contributed to the injury." (R. 604, f. 3 to R. 605, f. 1)

in that the instruction commingled the applicable rules of law relating to the effect of contributory negligence under the coupler count and under the general negligence count, as duly excepted to at the conclusion of the charge (R. 611, f. 1).

7. The court erred in refusing to submit to the jury defendant's requested Special Interrogatory No. I, reading as follows:

> I. Did the cars fail to couple because the couplers were defective?

and duly excepted to at the time (R. 612, f. 1).

8. The court erred in refusing to submit to the jury defendant's requested Special Interrogatory No. II, reading as follows:

> II. Did the cars fail to couple because the couplers were not properly set, adjusted or aligned for coupling?

and duly excepted to at the time (R. 612, f. 1).

9. The court erred in refusing to submit to the jury defendant's requested Special Interrogatory No. III, reading as follows:

> III. Was the failure of the cars to couple a proximate cause of the accident?

and duly excepted to at the time (R. 612, f. 1).

10. The court erred in refusing to submit to the jury defendant's requested Special Interrogatory No. IV, reading as follows:

> IV. Was the defendant negligent in the manner in which its swingman, Mr. Hiney, handled the coupling movement?

and duly excepted to at the time (R. 612, f. 1).

11. The court erred in refusing to submit to the jury defendant's requested Special Interrogatories Nos. V and VI, reading as follows:

> V. Was the plaintiff guilty of contributory negligence?
>
> VI. If your answer to No. V is yes, in what per cent was the plaintiff's negligence the cause of the accident?

and duly excepted to at the time (R. 612, f. 1).

15. The court erred in denying defendant's motion for a new trial on the grounds that the damages of $170,154.81

awarded by the jury were excessive, appearing to have been given under the influence of passion or prejudice (R. 645, f. 1).

16. The court erred in submitting the coupler count to the jury as one of the possible bases of liability of the defendant.

EXCERPTS FROM APPELLANT-DEFENDANT'S PETITION FOR REHEARING

(Record pp. 853-855)

APPELLANT'S PETITION FOR REHEARING

Appellant respectfully petitions the Court for a rehearing in the above entitled case, in which the Court filed its decision on February 25, 1955, on the following grounds:

I.

THE EXISTENCE OF PASSION AND PREJUDICE BY THE JURY IS INHERENT IN THIS COURT'S DECISION AND A NEW TRIAL SHOULD BE GRANTED.

This Court reduced the verdict in this case by $65,154.81, which sum is more than a third of the total amount of the verdict. Although the Court found that the large verdict resulted from the jury being mis-led by the argument of the attorney for the plaintiff-respondent it said the result was not due to passion or prejudice and denied a new trial. We submit that the Court's conclusion refutes its own finding that the jury was not mis-led by passion or prejudice. When a jury is so mis-led by a lawyer's argument that a verdict of

$170,154.81 is excessive by $65,154.81, we assert the jury could not have been mis-led without the argument having produced passion and prejudice which tainted the fair-mindedness required of jurors, and for this reason the Court, under the rule in F.E.L.A. cases, should have granted an unconditional new trial instead of just reducing the verdict.

Can this Court categorically state that the excess of $65,154.81 was not produced by such obvious sources of passion and prejudice as the plaintiff's doctor eliciting a cry of pain by squeezing the stump of the plaintiff's arm and the hysterical weeping of plaintiff's pregnant wife on the witness stand which caused jurors to weep with her?

Office - Supreme Court, U. S.
FILED
SEP 21 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 349

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

vs.

WILLIAM E. HALLADA, JR.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI

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JURISDICTION

Respondent admits that this Court has jurisdiction to grant a Writ of Certiorari in this case, but he contends that this case is not a proper one for the exercise of such jurisdiction, and that because that is true, the Court should deny certiorari.

STATEMENT OF THE CASE

The respondent does not wish to unduly burden this Court with an additional statement of the facts, inasmuch as we think an adequate statement of the facts would be those set forth in the opinion of the Court below (R. 832-834). However, the petitioner's so-called *Evidence as to Couplers* cannot be accepted. The respondent (R. 140) merely states that

he thinks the alignment has to be a little better on curved track than it is when the cars are on a straight track. Witness Graham (R. 317) states that you move the drawbar to align it when the couplers and knuckles have been forced out of alignment. There is no evidence that the drawbars here had to be moved or adjusted in order to have the coupling take place while the two cars were on the curved track. In fact, petitioner's witness Hiney testified (R. 419):

> "A. The situation you run into there is if your cars are on a curved track and you come back into them when you do couple into them and they are not properly aligned, then you would have to take measures to align them, but every day in your work if you were to try to see that you had—if you had to align your drawbar every time you made a coupling you would not get very far.
>
> Mr. Westphal:
>
> Q. In other words, as I understand it, you would not align the drawbar until after you had tried to couple and they had not coupled, is that right?
>
> A. Sure. As long as you make a coupling that is sufficient. As long as you make a coupling with one knuckle open that is sufficient."

Petitioner also refers to the photographs to show the extent of the curve of the track under the *Evidence as to Couplers*. We would like to return to the record, and in support of the lower court's finding that the curve was slight, cite the testimony of its expert witness, Van Steinberg, at R. 495, ff. 1, 2:

> "Q. And is the track at the location of the frog, between the switch and the frog, is that a straight track or a curved track?
>
> A. Well, there is a certain amount of curvature in the track there (indicating).
>
> * * * * *
>
> Q. And what effect does the presence of that curve have upon the alignment of the couplers or drawbars?

A. Well, when your car is on the curve, the east drawbar is to the north of south this way (indicating), and the west drawbar would be this way (indicating). *It isn't a great deal, but it is off. It is not perfectly on center.*" (Emphasis supplied.)

ARGUMENT

Summary.

The Writ should be denied as the State Court properly applied the law in accord with the decisions of the United States Supreme Court. The *Affolder* case does not apply to the alignment of drawbars, and assuming that it did, the question here under the evidence was still a jury question. Further, the two causes of action were separated in the instructions resulting in no prejudice to the petitioner. Lastly, the case of *Mpls., St. P. & S. S. M. Ry. Co. v. Moquin*, 283 U.S. 520, has no application here.

I.

Misalignment of the Drawbar Is No Defense under the Federal Safety Appliance Act.

It is submitted that the petitioner must overcome two hurdles to his motion for a directed verdict involving the coupler provisions of the Safety Appliance Act. First, the doctrine of the case of *Affolder v. N. Y. C. & St. L.*, 339 U.S. 96, must be extended to include not only couplers but also drawbars. Secondly, assuming for the argument that petitioner's claim that the misalignment is a good defense, there had to be a finding as a *matter of law* that the misalignment was of such a degree that the coupling could not have taken place under the circumstances here. This argument is so adequately answered by the Minnesota Supreme Court that it would be presumptuous on our part to attempt to answer it any other way than by citing from its opinion (R. 835-838):

"1-2. The Federal Safety Appliance Act (27 Stat. 531, 45 U.S.C.A., Sec. 2) provides that:

> "'It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.'

"The duty imposed by this section is absolute and wholly unrelated to any question of negligence.[1] If the coupler is properly set and fails to couple on the particular occasion in question, it is immaterial to the determination of whether the Federal Safety Appliance Act has been violated whether the coupler functioned properly before or after the particular occasion in question.[2] In the instant case it is undisputed that the couplers failed to couple upon impact. The United States Supreme Court has held, however, that mere failure of couplers to couple upon impact does not necessarily constitute a violation of the Federal Safety Appliance Act.[3] Recently that court in the Affolder case made it clear that its statement that the failure of a coupler to couple upon impact is in itself an actionable wrong *assumes that the coupler was placed in a position to operate on impact.*[4] Since a decision is not authoritative beyond its operative facts, the general language of the Affolder case must be construed to mean nothing more than that the failure of couplers to couple upon impact is in itself an actionable wrong *only if at least one of the couplers is in an open position so as to operate on impact.* Thus,

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[1] *Johnson v. Chicago G. W. Ry. Co.*, 242 Minn. ....., 64 N.W.2d 372; *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 70 S.Ct. 226, 94 L.Ed. 236; *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 70 S.Ct. 200, 94 L.Ed. 187; *Delk v. St. Louis & San Francisco R. Co.*, 220 U.S. 580, 31 S.Ct. 617, 55 L.Ed. 590.

[2] *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434, 70 S.Ct. 226, 229, 94 L.Ed. 236, 241.

[3] *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96, 70 S.Ct. 509, 94 L.Ed. 683.

[4] *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96, 99, 70 S.Ct. 509, 511, 94 L.Ed. 683, 688.

for instance, if the knuckles on both of the couplers are closed and the cars fail to couple upon impact, the railroad has a good defense against liability under the Federal Safety Appliance Act because at least one knuckle must be open in order for the couplers to couple.[5]

"3. The defendant contends that whenever a coupling is attempted on a curve, a failure to adjust the drawbars is likewise a good defense under the Federal Safety Appliance Act. There is a distinction, however, between failure to couple because of misalignment and a failure because of closed knuckles. Knuckles are purposely opened and closed whereas the drawbar unintentionally becomes misaligned.[6] Misalignment may result from wear which causes more lateral play than is necessary to permit the rounding of curves.[7] An additional difference is that knuckles can be opened without going between the cars, whereas alignment is made by moving the drawbar which necessitates going between the cars.[8] In the light of these differences, it is well to keep in mind that one of the basic purposes of the act is to require the automatic coupling and uncoupling without the necessity of men going between the cars.[9]

"In view of these facts and the prior decisions which have refused to absolve railroads from liability on a defense of drawbar misalignment,[10] it would be illogical to defeat a basic purpose of the Federal Safety Appli-

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[5] *Ibid.*

[6] *McGowan v. Denver & R. G. W. R. Co.* (Utah), 244 P.2d 628.

[7] See *San Antonio Ry. Co. v. Wagner*, 241 U.S. 476, 36 S.Ct. 626, 60 L.Ed. 1110; *Atlantic City R. Co. v. Parker*, 242 U.S. 56, 37 S.Ct. 69, 61 L.Ed. 150; *White v. Atchison, Topeka & Santa Fe Ry. Co.* (Mo.), 244 S.W.2d 26.

[8] *McGowan v. Denver & R. G. W. R. Co.* (Utah), 244 P.2d 628.

[9] *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 70 S.Ct. 200, 94 L.Ed. 187; *Hampton v. Des Moines & Cent. I. R. Co.* (8 Cir.), 65 F.2d 899; *Hohenleitner v. Southern Pac. Co.* (C.C.D. Ore.), 177 F. 796; *Holz v. Chicago, M., St. P. & P. R. Co.*, 176 Minn. 575, 224 N.W. 241.

[10] See *Atlantic City R. Co. v. Parker*, 242 U.S. 56, 37 S.Ct. 69, 61 L.Ed. 150; *San Antonio Ry. Co. v. Wagner*, 241 U.S. 476, 36 S.Ct. 626, 60 L.Ed. 1110; *Chicago, St. P., M. & O. Ry. Co. v. Muldowney* (8 Cir.), 130 F.2d 971; *Hampton v. Des Moines & Cent. I. R. Co.* (8 Cir.), 65 F.2d 899; *McGowan v. Denver & R. G. W. R. Co.* (Utah), 244 P.2d 628.

ance Act by extending the rule of the Affolder case beyond its authoritative scope and thereby to attribute to the United States Supreme Court an intent to reverse its prior holdings by an implication to be drawn solely from the generality of its language. We therefore hold that, although the failure of couplers to couple automatically upon impact does not constitute a violation of the Federal Safety Appliance Act unless one of the coupler knuckles is open, it is no defense that the failure to couple upon impact is caused by a misalignment of the drawbars.

"Irrespective of how the Affolder case is interpreted, we must conclude upon the evidence herein that the jury was warranted in finding a violation of the Federal Safety Appliance Act. The degree to which a drawbar must be misaligned before there is a failure to couple upon impact depends on the sharpness of the curve, the alignment of the other drawbar, the extent to which the knuckles are open, and whether only one or both knuckles are open.[11] When the knuckles on both drawbars are open, the alignment does not have to be as close as when only one knuckle is open.[12] The evidence in the record shows that the knuckle on the east end of the flatcar and the knuckle on the west end of the boxcar were both open. It also shows that the curve was slight so as not to greatly affect alignment and further that only 15 feet east of the east end of the flatcar the track was straight. Under the circumstances the cars should have coupled upon the curve in question unless the couplers were defective. Upon such evidence the jury was warranted in finding a violation of the Federal Safety Appliance Act. Similar findings have been upheld upon similar evidence.[13]"

Under no circumstances was the petitioner here entitled to a directed verdict on the coupler count.

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[11] *McGowan v. Denver & R. G. W. R. Co.* (Utah), 244 P.2d 628.

[12] *Ibid.*

[13] *Atlantic City R. Co. v. Parker*, 242 U.S. 56, 37 S.Ct. 69, 61 L.Ed. 150; *San Antonio Ry. Co. v. Wagner*, 241 U.S. 476, 36 S.Ct. 626, 60 L.Ed. 1110; *White v. Atchison, Topeka & Santa Fe Ry. Co.* (Mo.), 244 S.W.2d 26.

II.

Refusal to Submit the Special Interrogatories Was Not Error, and No Prejudicial Error Resulted from the Court's Charge.

Once again we have an argument fully covered in the Trial Court and the State Supreme Court wherein we feel that the answer is best given in the opinion of the Minnesota Supreme Court. If the Court will bear with us, we would like to cite from that opinion at R. 840-842:

> "7. The trial court did not abuse its discretion in refusing to submit to the jury defendant's requested written interrogatories with the appropriate forms for a general verdict. Rule 49.02 of Rules of Civil Procedure provides that:
>
> > " 'The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict.'
>
> "This portion of the rule is substantially in accord with Minnesota practice prior to the adoption of the rules of civil procedure.[20] Under our prior practice it was discretionary with the trial court to decide whether to submit interrogatories with a general verdict.[21] Federal Rule 49(b) is identical with our Rule 49.02. In construing Federal Rule 49(b), the courts have likewise left the submission of written interrogatories in civil jury cases to the judge's discretion.[22] There may be situations in which the refusal to submit written interrogatories would be an abuse of discretion.[23] We find no reason to

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[20]See 2 Youngquist & Blacik, *Minnesota Rules Practice*, p. 492.

[21]*Roske v. Ilykanytcs*, 232 Minn. 383, 45 N.W.2d 769.

[22]*Skidmore v. Baltimore & O. R. Co.* (2 Cir.), 167 F.2d 54.

[23]In 5 Moore, *Federal Practice* (2 Ed.), Par. 49.05, it is stated:

> "• • • There are cases in which a proper exercise of its discretion under Rule 49 would prompt the trial court to require a special verdict or a general verdict accompanied by interrogatories, such as cases in which complex instructions would otherwise have to be given to the jury, or in which there is a likelihood of costly errors on the part of the court and the jury, or in which the facts to be determined are complicated or technical."

hold that the trial judge abused his discretion in refusing to submit defendant's requested interrogatories, especially since the record fails to indicate that any prejudice resulted.

"8. The charge to the jury did not distinguish and separate the two causes of action as clearly as should have been done; nevertheless, taking the charge as a whole we cannot say that the jury was misled as to either negligence or contributory negligence with respect to either of the causes. Where a claim for relief under the Federal Safety Appliance Act is joined with a negligence action under the Federal Employers' Liability Act, the two causes of action should be clearly distinguished and separated and the court should impress upon the jury the importance of distinguishing between the two causes.[24] The claim arising from a violation of the Federal Safety Appliance Act is in no way dependent upon negligence; whereas, an action brought under the Federal Employers' Liability Act requires a showing of negligence.[25] Under the former, contributory negligence is immaterial unless it is the sole proximate cause of plaintiff's injuries; whereas, under the latter, contributory negligence goes to a proportionate diminution in the amount of damages.[26] Certain issues such as causation and the nature and extent of the injuries are, however, common to both actions.[27] Taking the charge as a whole, and all charges should be so construed, we find no prejudicial error."

A referral to the requested special interrogatories will show that the first and fifth were incorrect statements of the law. Further, that the others were adequately covered by the general charge.

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[24] *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 70 S.Ct. 200, 94 L.Ed. 187.

[25] *Ibid.*

[26] *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63, 67, 63 S.Ct. 444, 449, 451, 87 L.Ed. 610, 615, 617, 143 A.L.R. 967; *Johnson v. Chicago G. W. Ry. Co.*, 242 Minn. ....., 64 N.W.2d 372.

[27] *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 70 S.Ct. 200, 94 L. Ed. 187.

There is no showing of an abuse of discretion on the part of the trial judge in refusing to submit the interrogatories. The case of *O'Donnell v. Elgin, Joliet & E. R. Co.* holds that "it is almost indispensable to an intelligible charge to the jury that a clear separation of the two kinds of actions be observed and impressed." A reading of the entire charge clearly indicates that the plaintiff here was under the Safety Appliance Act and also the F.E.L.A.—the violation of the coupler provision and negligence of the defendant's employee, Hiney. This, we believe, was clearly pointed out by the judge who commented on the disputed fact as to whether or not the plaintiff had said to Mr. Hiney, "Okay, back her up." (R. 110-112, 412.)

It is respectfully submitted that the petitioner here was not prejudiced in any way, either by the refusal of the special interrogatories or the general charge—that the doctrine of *O'Donnell v. Elgin,* supra, was applied in the instant case.

III.

The Verdict Was Not a Result of Passion and Prejudice.

Here, the petitioner actually presents its only new argument and this is based upon the reduction in the size of the verdict. In effect it is asking this Court to make a finding of fact to the effect that there was passion and prejudice in the case. It tries to support the argument with the record of the trial and the amount of the reduction. We submit that the case of *Mpls., St. P. & S. S. M. Ry. Co. v. Moquin,* 283 U.S. 520, has no application. In that case, the Supreme Court of Minnesota made a finding of passion and prejudice (283 U.S. 520):

> "* * * From the entire record before us we are of the opinion that the verdict is excessive because of passion and prejudice."

Then the Supreme Court ordered a remittitur. The United States Supreme Court held that no verdict can stand which *is found* to be in any degree the result of appeals to passion and prejudice. In the instant case the trial court and the Supreme Court of this state found that there was no passion and prejudice in the instant case. Once again we refer to the record at pages 849-851:

> "15-16. The segmentation process of breaking the damage picture into fragments and then applying to each fragment a mathematical formula whereby damages are calculated at a fixed rate per day for the entire period of the injured person's life expectancy, though illuminating, may be misleading. An injured person's earning expectancy—both as to duration and amount of income—cannot be ascertained by merely multiplying the number of days in a life expectancy by a fixed rate per day. Many other related and uncertain factors must be considered. Furthermore, pain and suffering which is subjective and which at its very worst usually varies from day to day cannot, with any finality, be estimated on a daily basis. Usually the jury is asked to use the worst hour or the worst day as a yardstick for evaluating pain. Whatever process is adopted in fixing an injured person's damages, the reasonableness of the lump sum awarded by the jury must, in the last analysis, also be tested from the unitary standpoint of what total financial benefits that lump sum will confer upon the injured person as a means of making him financially *whole*. No award can be sustained unless it stands the test of reasonableness in the light of its over-all effect.
>
> * * * * *
>
> "We find no evidence of passion and prejudice by the jury in arriving at its verdict. Apparently the excessive verdict resulted merely from reliance solely upon mathematical formulas without testing the reasonableness of the amount awarded from the standpoint of its over-all effect."

Clearly it is shown how the Supreme Court of this state arrived at its finding of excessiveness: It applied the test of reasonableness in the light of its over-all effect. Apparently, the Court realized that there are many reasons, such as perhaps the ability of a trial man, other than passion and prejudice, that may result in an excessive verdict.

CONCLUSION

The Petition for Certiorari raises no substantial question for consideration of this Court. The Courts below have applied the law under the decisions of this Court. We, therefore, respectfully submit that the Court should deny the Petition for Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM — 1955

No. 349

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

WILLIAM E. HALLADA, JR.,
Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Respondent does not dispute the fact that a determination by this Court of the questions presented for review is important to the proper administration of justice under the Safety Appliance Act and the Federal Employers Liability Act. Respondent's brief merely argues that the decision below is correct and in this respect he begs the question by

citing the opinion below as evidence of its alleged correctness. While the petition herein demonstrates that the decision below was based upon an erroneous determination of the three questions presented for review, the following points raised by respondent deserve additional comment.

1. Failure to Align Draw-bars Is a Defense

The evidence in this case establishes as a matter of law that a proper attempt to couple the two cars on the curved track, shown in Defendant's Exhibits F and G, required an alignment of the draw-bars in order to compensate for the *functional* misalignment caused by the curved track. Respondent's only attempt to refute this fact is based upon an abridged version of witness Van Steinberg's testimony. The full quotation of his testimony follows: (R. 495-496)

> "Q. And is the track at the location of the frog, between the switch and the frog, is that a straight track or a curved track?
>
> A. Well, there is a certain amount of curvature in the track there (indicating).
>
> Mr. Rerat: Not as much as you are indicating there out from the switch to the frog.
>
> Q. (Mr. Westphal): I will ask you to assume, Mr. Van Steinberg, that the curvature is as shown here on defendant's Exhibit F on the track which swings to the left from the switch as you see it in that picture (indicating)?
>
> A. There is a curve there. That is what I said.
>
> Q. And what effect does the presence of that curve have upon the alignment of the couplers or draw-bars?
>
> A. Well, when your car is on the curve the east draw-bar is to the north of south this way (indicating), and the west draw-bar would be this way (indicating). It

isn't a great deal but it is off. It is not perfectly on center.

Q. And what kind of an alignment would you make to the draw-bars or either or both of those draw-bars on either or both of those cars in order to make that coupling operation?

A. I would pull this coupler to the north and this to the south (indicating) with both knuckles open.

Q. And in that position would they be properly aligned for a coupling on that track?

A. Yes, sir.

Q. And is that the practice and the custom of making couplings between railroad cars?

A. Yes. You can tell by looking when you are on the job whether it is in alignment or not."

This *uncontradicted* testimony, based upon photographs of the track itself, establishes that the functional misalignment was of such a degree that the coupling could not have been made upon impact without an adjustment of the draw-bars.

The failure to align the couplers which occurred in this case was not a mechanical failure but was merely a human failure and whether it was the duty of respondent or of someone else to align the couplers was neither in issue nor litigated at the trial. Respondent's quotation (Resp. Brief, p. 2) of witness Hiney's gratuitous statement that he employs the trial and error method of aligning mechanically perfect couplers does not take this case out of the principle of the *Affolder* decision which requires that the couplers be properly set, adjusted and aligned before a single failure to couple can be held to be a violation of the Safety Appliance Act.

2. Trial Court's Erroneous Instructions

Respondent misconceives the petitioner's second question presented for review which is based upon the finding by the Minnesota Supreme Court that the charge to the jury did not distinguish and separate the two causes of action as clearly as should have been done under the rule of the *O'Donnell Case* and upon that Court's erroneous conclusion that this error in the charge did not require a new trial. Reference was made in the petition herein to the refusal to submit petitioner's requested special interrogatories merely to illustrate that petitioner did not lay back and invite the error which was found by the Minnesota Supreme Court. A proper charge to the jury within the principle of the decision in the *O'Donnell Case* is just as important in order to distinguish the different effects of contributory negligence as it is to distinguish a negligence count from a non-negligence count, and for this reason the Writ prayed for should be granted.

3. Monstrous Excess in Verdict Required a New Trial

Admittedly the verdict was excessive by $65,154.81. Petitioner contends that this monstrous excess required a new trial under the rule in F.E.L.A. cases announced in the *Moquin Case*. While the improper influence of passion and prejudice on the part of the jury appears upon the face of things, petitioner fortified its argument by pointing to several obvious sources of that passion and prejudice, viz., the squeezing of the stump of respondent's arm and the hysterical weeping of respondent's pregnant wife upon the witness stand. Respondent in his brief has laid claim to the "ability of a trial man" as the source of the excess. (It might here be observed

that some of the "abilities" of respondent's "trial man" were cited to the trial court and Minnesota Supreme Court as a basis for a new trial on the grounds of misconduct of counsel, see Assignments of Error Nos. 14b, 14c, 14d, and 14e, R. 669-672.)

But is such a search for the source of the passion and prejudice necessary in order to establish the legal action required by the reviewing court? The two avenues of judicial approach can best be illustrated by comparing the decision below with the recent decision in *Beckstad v. Shelly Oil Co.*, (U.S.D.C. Minn. 1955) 131 F. Supp. 940. In that case a verdict of $175,956 was awarded a 20-year-old plaintiff for first, second and third degree burns resulting in a 50% permanent disability to one leg and 25-30% to the other. The district judge in the *Beckstad Case,* citing the decision below as authority, likewise came to the conclusion that the verdict was grossly excessive. But there the similarity between the two decisions stops. In granting an unconditional new trial in the *Beckstad Case* the court concluded that such monstrous excess could not be cured by remittitur but that the entire verdict must be vititated and a new trial ordered. The Court stated:

> "It is apparent to the Court that the jury here committed grave error in subscribing, even in part, to the mathematical computations proposed for use in determining damages without giving reasoned thought to either the incidents composing the elements of damages in each category or the overall reasonableness of the total damages awarded. The verdict must have been the result of pity and sympathy for the plaintiff. Nothing else explains its inordinate size.
>
> "A new trial must be granted and I have been in a quandary as to whether I have the authority to make the

granting thereof conditional upon a remittitur of the excessive portion of the verdict. After reading the cases I am satisfied that the entire verdict is vitiated and that it cannot be cured by a remittitur. Ford Motor Co. v. Mahone, 4 Cir. 1953, 205 F. 2d 267; Brabham v. State of Mississippi, 5 Cir. 1938, 96 F. 2d 210; National Surety Co. v. Jean, 6 Cir. 1932, 61 F. 2d 197; Minneapolis, St. P. & S. S. M. Ry. Co. v. Moquin, 1931, 283 U. S. 520, 51 S. Ct. 501, 75 L. Ed. 1243.

"A new trial is ordered."

Irrespective of whether passion and prejudice must be traced to a source or whether it is inherent in the very size of the excess, it is petitioner's contention that the monstrous excessiveness of $65,154.81 required an unconditional new trial of the case at bar.

CONCLUSION

The Writ prayed for should issue to review all three of the questions presented.

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